NO. 931199 JAN 26 1994

In The

SUPREME COURT OF THE UNITED STATES

October Term 1993

MARVIN STONE

Petitioner

-vs-

IMMIGRATION AND
NATURALIZATION SERVICE Respondent

Petition for Writ of Certiorari

to the

UNITED STATES COURT OF APPEALS

for the

SIXTH CIRCUIT, CINCINNATI OHIO

MARVIN STONE pro se

184 N MILL ST 2nd fl

Lexington KY 40507

48 pp

QUESTION PRESENTED

Whether the SIXTH CIRCUIT erred in its decision in not accepting jurisdiction of the Petition for Review submitted by Petitioner, and filed within 90 days after the return of a decision on a motion before the BOARD OF IMMIGRATION APPEALS (BIA)-and whether the filing of a motion for reconsideration or to reopen within the 90 day period, stops the §106(a)(1) 'clock' (see IMMIGRATION ACT, 8 USC §1105a(a)(1)) from running.

This Petition presents an issue resolved by implication by the SIXTH CIRCUIT, but not specifically & unequivocally decided by this Honorable COURT. And, the opinion below conflicts by implication with previous decisions of this Honorable COURT, and with decisions of the NINTH & ELEVENTH CIRCUITS.

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8 USC §1105 a(a)(1) See IMMIGRATION ACT

§ 106 (a)(1)

NO.

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Petition for Writ of Certiorari
to the
UNITED STATES COURT OF APPEALS
for the SIXTH CIRCUIT CINCINNATI

Petitioner Marvin Stone, a Canadian national, respectfully prays that a Writ of Certiorari issue to review the judgment & opinion of the UNITED STATES COURT OF APPEALS for the SIXTH CIRCUIT refusing to accept jurisdiction of his Petition for review filed in a timely manner, within 90 days from the last decision of the Board of

Immigration Appeals (BIA). Said opinion & decision of the SIXTH CIRCUIT presents an issue not specifically & unequivocally decided by this Honorable COURT, and said decision by the SIXTH CIRCUIT, while similar to decisions in the THIRD & SEVENTH CIRCUITS, conflicts with previous decisions of this Honorable COURT, and with decisions of the NINTH CIRCUIT & ELEVENTH CIRCUIT.

OPINIONS BELOW

The decision of the Court of Appeals for the SIXTH CIRCUIT is reproduced currently as 93-3163 (6th CIRCUIT 1993) and unpublished as yet, and appears in APPENDIX A to this Petition. The 2 decisions of the BOARD of IMMIGRATION APPEALS (BIA) appear in APPENDIX B.

JURISDICTION

The SIXTH CIRCUIT's decision in not accepting jurisdiction of Petitioner's Petition for Review was decided & filed on January 6th,

1994, and is set forth in APPENDIX A; And Petitioner invokes this Honorable COURT's jurisdiction within the 90 day period after a decision of the SIXTH CIRCUIT COURT OF APPEALS.

STATUTORY PROVISIONS INVOLVED

Under §106(a)(1) of the IMMIGRATION & NATURALIZATION ACT 8 USC §1105a(a)(1) a Petition for Review must be filed within 90 days after the date of a final order. The question to be answered by this Honorable COURT is whether the filing of a motion to reconsider or reopen within the 90 day period stops the §106a(1) clock from running. Petitioner filed the Petition for Review for which the SIXTH CIRCUIT would not accept jurisdiction promptly within 90 days after receipt of the last motion received from the BIA. As an improbable aside to the foregoing question, is that Petitioner, who was proceeding pro se, sought advice from both the SIXTH CIRCUIT's CLERKS

office, and the office of THE IMMIGRATION JUDGE which has tenure of Petitioner's case, and both of the foregoing institutions, on 2 occasions, advised petitioner to await until the return of the last motion to the BIA, before proceeding & filing a Petition for Review at the SIXTH CIRCUIT. Petitioner was never ever late on any court matter-on the advice given Petitioner by the aforesaid institutions.

STATEMENT OF THE CASE

Petitioner is a 59 year old native & citizen of CANADA who entered the UNITED STATES from CALGARY ALBERTA to CHICAGO in about 1978 legally, as a businessman without any time limitation. Petitioner had entered the country many times before, but each time legally, and as a businessman. Petitioner was convicted in 1982 in the EASTERN DISTRICT of KENTUCKY of conspiracy & mail fraud charges pursuant to 18 USC§ 371 & 1341. The convictions

& indictments were in 1982, but the offences actually occurred in 1977; Petitioner was sentenced to 3 years in prison, and was actually incarcerated for about 18 months at FCI LEXINGTON.

An 'order to show cause' was issued by the INS on March 18th 1987, and erroneously charged Petitioner with deportability pursuant to Section 241 (A)(2) of the Act, as a non-immigrant visitor, who entered the country for pleasure, and with an overstay. The Immigration Judge (IJ) found Petitioner deportable, and also found Petitioner barred by Statute from establishing good moral character, under Section 101 F of the Act.

Petitioner appealed to the BIA and argued that the 'order to show cause' was in error & legally defective; That the 'service regulations' as utilized by the Immigration officials-do not conform with the Statute, and are therefore unconstitutional; And that Section 101F(7) of the Act should not act as a

'bar' where offences occurred more than 10 years before incarceration; The BIA dismissed the above appeal & issued a final order of deportation; Petitioner promptly filed a motion to reconsider with the BIA, and after consulting with the CLERKS OFFICE at the SIXTH CIRCUIT,and the OFFICE OF THE IMMIGRATION JUDGE at CHICAGO, Petitioner was unequivocally told by both bodies, to await until the return of the BIA's decision, on the lastly filed motion, before instituting any Petition for Review with the SIXTH CIRCUIT, so as to prevent a multiplicity of appeals.

When the last motion before the BIA was returned on the 3rd of February, 1993, Petitioner promptly filed the instant Petition for Review at the SIXTH CIRCUIT enunciating the aforesaid 3 grounds as submitted to the BIA in said Petition for Review. This Petition for Review was filed on the 25th of March 1993, within the appropriate time li-

mit for filing such Petitions;

The decision of the SIXTH CIRCUIT dismissing the Petition for Review for want of jurisdiction is set out in the APPENDIX hereto, and is at odds with the decisions of the NINTH & ELEVENTH CIRCUITS, and conflicts with a previous decision of this Honorable COURT.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for 3 reasons: Firstly, this Petition presents an issue resolved by implication by the SIXTH CIRCUIT, but not specifically & unequivocally decided by this Honorable COURT; Secondly, the SIXTH CIRCUIT opinion conflicts by implication with a previous decision of this Honorable COURT, and although the SIXTH CIRCUIT's opinion tends to agree with certain decisions of the THIRD & SEVENTH CIRCUITS, its opinion clearly conflicts with the decisions of the NINTH & ELEVENTH CIRCUITS; And thirdly, the SIXTH CIRCUIT's CLERKS OFFICE as well as the

the OFFICE of the IMMIGRATION JUDGE, must bear some responsibility in giving improper information & proceedures which sabotage 'pro se' filers of petitions as has happened herein. See reply brief of Petitioner-as 93-3163; Petitioner for his part, is not guilty of any dilatory practices, and has been timely in all court filings to date, often making filings far ahead of required time schedules.

Were petitioner resident within the NINTH CIRCUIT's domain, there is no doubt that the NINTH CIRCUIT would have entertained jurisdiction of the said Petition for Review. The NINTH CIRCUIT in BREGMAN, 351 F2d, 401 has reasoned that the SUPREME COURT had interpreted the reference in §1105a(a) to "all final orders of deportation" as including denials of motions to reopen. It followed from this in the NINTH CIRCUIT's view "that if the motion to reopen before the BIA is within 6 months of the final order of deportation & the petition to this Court is within 6 months of the denial

of the motion...this Court has jurisdiction to review both the final order of deportation & the denial of the motion to reopen." Id at 402. In other words, as the NINTH CIRCUIT suggested in a subsequent opinion, "Congress visualized a single administrative proceeding in which all questions relating to an alien's deportation would be raised & resolved, followed by a single Petition in a Court of Appeals for judicial review..." YAMADA vs INS, 384 F2d 214, 218 (9th CIRCUIT 1967). Support for this view-which is consistent with the argument that the SOLICITOR GENERAL presented to the SUPREME COURT in GIOVA (citation following) -- was said to be found in concern expressed by a congressional committee over the fact that"(s)uccessive piecemeal appeals had been used as a dilatory tactic to postpone the execution of deportation orders".

The THIRD CIRCUIT decisions, and the decision of the SEVENTH CIRCUIT (AKRAP v INS 966 F2d 267) are in direct conflict with the

NINTH CIRCUIT's view, and the view of the ELEVENTH CIRCUIT in FLEARY. See FLEARY v INS 950 F2d at 713, which seems to hold that an administrative order of deportation is not final where a motion to reopen is pending at the BIA.

The NINTH CIRCUIT's rationale reflects that Court's understanding of the logic implicit in GIOVA v ROSENBERG 378 US 18 (1964) wherein the SUPREME COURT, in a one-sentence per curiam opinion reversed a NINTH CIRCUIT decision reported at 308 F2d 347 (1962),and the SUPREME COURT then reversed the dismissal of the matter by the NINTH CIRCUIT for want of jurisdiction & remanded the case back to the NINTH CIRCUIT with directions to entertain the Petition for Review.

Added to all of this, Petitioner asked the SIXTH CIRCUIT's CLERKS OFFICE, & the office of THE IMMIGRATION JUDGE (twice) for the correct proceedures to be followed for a Petitioner who is filing 'pro se', & was

given wrongful information by both institutions, who must bear some responsibility in not sabotaging 'pro se filers'. The foregoing institutions are routinely giving out misinformation that Petitioners must await the return of all motions before the BIA, prior to commencing a Petition for Review at the courts of appeal.

This Honorable COURT then, should take this opportunity to clarify its holdings in the GIOVA case, and the various rulings in the appellate circuits, including the SIXTH CIRCUIT herein, which are in conflict to this very date, and to protect & educate 'pro se' filers of Petitions.

CONCLUSION

For the reasons set forth above, a WRIT of CERTIORARI should issue to review the judgment & opinion of the COURT OF APPEAL in this matter.

If this COURT elects not to address the

issues presented in this writ at the present time, it is requested that the writ issue & that the matter be remanded to the SIXTH CIRCUIT for redetermination in light of this COURT's opinion in the GIOVA case. Supra.

Dated at LEXINGTON KY
this 17th of January, 1994.

Respectfully
Submitted:

State of Kentucky)
County of Fayette)

D. Lawrence Sherman
NOTARY PUBLIC
My commission expires
20 March 1995

MARVIN STONE pro se
184 N MILL ST 2nd Fl
LEXINGTON KY 40507

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing petition for a writ of certiorari of the Petitioner MARVIN STONE, has this 17th day of January, 1994, been made upon the SOLICITOR GENERAL, by mailing 3 true copies in the UNITED STATES mail, postage prepaid, addressed to:

SOLICITOR GENERAL
DEPT OF JUSTICE
WASHINGTON DC 20530

M STONE pro se

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. P (6th Cir.)
File Name: 94A0001P.06

No. 93-3163

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARVIN STONE,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION for Review of an Order of the Board of Immigration Appeals

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Decided and Filed January 6, 1994

Before: NELSON and BATCHELDER, Circuit Judges; and MATIA, District Judge.*

DAVID A. NELSON, Circuit Judge. Marvin Stone, the petitioner in this matter, seeks review of a deportation order that became final more than a year and a half before the petition for review was filed in this court. Under § 106(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(a)(1), a petition for review must be filed

*The Honorable Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

within 90 days after the date of the final order. The threshold question that we must answer is whether the filing of a motion for reconsideration within the 90-day period stopped the § 106(a)(1) clock from running.

Mr. Stone's deportation order became final in July of 1991. Stone promptly filed a motion asking the Board of Immigration Appeals to reconsider the order, but he did not file a petition for review in this court until March of 1993, after the motion for reconsideration had been denied. We believe that a 1990 amendment to the Immigration and Nationality Act compels the conclusion that a motion to reconsider does not toll the time for seeking judicial review. Mr. Stone's petition was thus untimely insofar as it dealt with the 1991 order.

While we have no jurisdiction to review the underlying deportation order, we do have jurisdiction to determine whether the Board abused its discretion in denying the petitioner's motion to reconsider the order. Finding no abuse of discretion, we shall deny relief.

I

Petitioner Stone, a businessman and sometime lawyer, is a life-long citizen of Canada. A frequent visitor to the United States prior to 1977,[1] he says that he has resided here continuously since that time -- "but not with legal immigration documentation," as he puts it.

On January 3, 1983, Mr. Stone was convicted in a United States District Court on mail fraud charges. His conviction was affirmed on appeal, and he served approximately 18 months of a three-year sentence at a federal correctional institution.

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[1]The Immigration and Naturalization Service apparently sought to exclude Mr. Stone from this country in 1975 because of criminal fraud charges pending against him in Canada. We gather that an immigration hearing officer held that Mr. Stone could not be barred from entering the United States as a visitor.

The Immigration and Naturalization Service instituted deportation proceedings against Mr. Stone subsequent to his release from prison. In January of 1988, at the conclusion of a series of hearings before an immigration judge, a deportation order was issued against Mr. Stone on the ground that he had remained in the United States for a longer time than permitted. (Under 8 C.F.R. § 214.2(b), as in effect in 1977, the initial stay in this country of a nonimmigrant business visitor was not supposed to exceed six months; the regulations authorized the granting of extensions in six-month increments, but Mr. Stone testified that he was unaware of the need to apply for an extension. Mr. Stone has remained in the United States for some years now without written authorization.)

The immigration judge also denied an application for suspension of deportation pursuant to § 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a), which grants authority to suspend deportation of an alien who has been physically present in the United States for at least seven years, who has been of good moral character during that time, and whose deportation would work extreme hardship on him or his family. Because Mr. Stone had been confined to a penal institution for more than 180 days within the seven-year period, the immigration judge concluded, a finding of good moral character was foreclosed by 8 U.S.C. § 1101(f)(7). That section provides, in pertinent part, that "[n]o person shall be regarded as, or found to be, a person of good moral character who . . . has been confined, as a result of a conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been convicted were committed within or without such [seven-year] period."

Mr. Stone appealed the immigration judge's order to the Board of Immigration Appeals. In a decision dated July 26, 1991, the Board dismissed the appeal. The order of deportation became final on that date under 8 C.F.R.

§ 243.1, which provides that "an order of deportation . . . shall become final upon dismissal of an appeal by the Board . . . ."

In August of 1991, proceeding *pro se*,[2] Mr. Stone filed with the Board a pleading styled "Motion to Reopen and/or to Reconsider its Decision; Appeal to the Board of Immigration Appeals." The motion did not set forth any "new facts to be proved at [a] reopened hearing," as would have been required for a motion to reopen, and the Board treated the document as solely a motion to reconsider. Neither type of motion could have served to stay the deportation order. See 8 C.F.R. § 3.8, which so provides.

In a short decision dated February 3, 1993, the Board denied the reconsideration motion as frivolous. Mr. Stone filed his petition for review in this court on March 25, 1993.

II

With the enactment in 1961 of the Immigration and Nationality Act, Pub. L. 87-301, 75 Stat. 650, Congress effected a major overhaul of this country's immigration laws. One of the objects of the 1961 legislation was to streamline judicial review of deportation orders. In a section codified at 8 U.S.C. § 1105a, the Act denied the district courts any role in the review process; subject to stated modifications, the procedure for direct review by the courts of appeals (a procedure prescribed by what is now Chapter 158 of Title 28) was made "the sole and exclusive procedure" for obtaining judicial review of final orders of deportation. 8 U.S.C. § 1105a(a). The "fundamental purpose" of § 1105a was "to abbreviate the process of judicial review . . . in order to frustrate certain practices . . . whereby persons subject to deportation were

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[2]Mr. Stone was represented by counsel at the outset of the hearings before the immigration judge, but the attorney did not appear at the final hearing; Mr. Stone has represented himself ever since.

forestalling departure by dilatory tactics in the courts." *Foti v. I.N.S.*, 375 U.S. 217, 224 (1963).

Under § 1105a(a)(1), as originally enacted, persons against whom deportation orders were issued were given up to six months within which to seek appellate court review. In the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, however, that period was reduced to 90 days for aliens who had not been convicted of aggravated felonies. In the case of an alien convicted of an aggravated felony, the filing period was cut to 30 days. 8 U.S.C. § 1105a(a)(1), as amended by Pub. L. 101-649, § 502(a).

Prior to 1990 a split of authority had developed among the circuits as to whether the filing of a motion to reopen or reconsider a final order of deportation operated to extend the time for seeking judicial review. In an opinion issued in 1986, *Nocon v. I.N.S.*, 789 F.2d 1028, 1033 (3rd Cir. 1986), the Court of Appeals for the Third Circuit rejected the contention that the filing of a motion to reopen or reconsider a final deportation order suspends the statutory time limit on seeking judicial review. "[T]o hold otherwise," the court said, "would defeat the purpose of [a] statute [that] . . . was designed to prevent undue delay in deportation once the alien's immigration status had been decided." *Id.* (internal quotations and citation omitted).[3] The court acknowledged that its approach was at odds with the approach of other courts of appeals, *id.* at 1031, citing *Bregman v. I.N.S.*, 351 F.2d 401 (9th Cir. 1965), and *Hyun Joon Chung v. I.N.S.*, 720 F.2d 1471

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[3]The conclusion that a motion to reopen or reconsider does not preclude the filing of a petition to review the final deportation order is supported, as the Third Circuit noted, by the fact that the regulation governing such motions "appears to assume the continuing appealability of the original deportation order . . . ." *Nocon*, 799 F.2d at 1033 n.5, citing 8 C.F.R. § 3.8(a) ("Motions to reopen or reconsider shall state whether the validity of the deportation order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status").

(9th Cir.), *cert. denied*, 467 U.S. 1216 (1984),[4] but the Third Circuit declined to accept the rationale of those cases.

The Ninth Circuit's rationale reflects that court's understanding of the logic implicit in *Giova v. Rosenberg*, 379 U.S. 18 (1964), a one-sentence per curiam opinion in which the Supreme Court reversed a Ninth Circuit decision reported at 308 F.2d 347 (1962). A deportation order against Mr. Giova had become final on September 15, 1957. Mr. Giova moved to reopen the proceedings before the Board of Immigration Appeals, and his motion was denied on November 3, 1961. He then sought judicial review of the denial of the motion to reopen, but did not appeal from the underlying order of deportation. The Court of Appeals dismissed the matter for want of jurisdiction, but the Supreme Court reversed the dismissal and remanded the case with directions to entertain the petition for review.

It is clear that Mr. Giova's petition for review dealt only with the denial of his motion to reopen and not with the deportation order itself. See 308 F.2d at 348. In *Bregman*, 351 F.2d 401, however, the Ninth Circuit reasoned that the Supreme Court had interpreted the reference in § 1105a(a) to "all final orders of deportation" as including denials of motions to reopen. It followed from this, in the Ninth Circuit's view, "that if the motion to reopen before the Board is within six months of the final order of deportation and the petition to this court is within six months of the denial of the motion . . . this court has jurisdiction to review both the final order of deportation and the denial of the motion to reopen." *Id.* at 402. In other words, as the Ninth Circuit suggested in a subsequent opinion, "Congress visualized a single administrative proceeding in which all questions relating

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[4]See also *Attoh v. I.N.S.*, 606 F.2d 1273 (D.C. Cir. 1979); *Pierre v. I.N.S.*, 932 F.2d 418 (5th Cir. 1991); and *Fleary v. I.N.S.*, 950 F.2d 711 (11th Cir. 1992), all of which stem from the Ninth Circuit's decision in *Bregman*.

to an alien's deportation would be raised and resolved, followed by a single petition in a court of appeals for judicial review . . . ." *Yamada v. I.N.S.*, 384 F.2d 214, 218 (9th Cir. 1967). Support for this view -- which is consistent with the argument that the Solicitor General presented to the Supreme Court in *Giova* -- was said to be found in the concern expressed by a congressional committee over the fact that "[s]uccessive, piecemeal appeals had been used as a dilatory tactic to postpone the execution of deportation orders." *Hyun Joon Chung*, 720 F.2d at 1474 (citing H. R. No. 1086, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2950, 2967).

It is true that Congress was concerned about dilatory tactics, but given the way in which the system works in practice the Ninth Circuit approach seems more conducive to dilatory tactics than does the Third Circuit approach. Under the Ninth Circuit's *Bregman* decision and its progeny, an alien against whom a final deportation order has been entered can file a reconsideration motion, meritorious or not, and simply wait for however long it takes for the authorities to commence execution of the deportation order or for the Board to decide the motion for reconsideration. Normally, when one of those events finally occurs, the alien can then obtain a stay of the deportation order by filing a petition for judicial review. (A motion to reopen or reconsider does not stay deportation, as we have seen, but the filing of a petition for review automatically stays deportation pending determination of the petition by the court unless the court directs otherwise. See 8 U.S.C. § 1105a(a)(3).) Given the measured pace at which the I.N.S. often operates, the filing of a motion for reconsideration may, under the Ninth Circuit approach, mean that the day of judgment in the court of appeals -- and actual deportation -- will not arrive until months or years later than would otherwise have been the case. (It is not without significance, in this connection, that it took the Board of Immigration Appeals more than 17 months to reject as frivolous the motion for reconsideration filed here by petitioner Stone.)

Whatever the law may have been previously, we do not believe that the Ninth Circuit approach is consistent with the statute as amended in 1990. In addition to cutting in half the time for filing a petition for review, the 1990 legislation amended 8 U.S.C. § 1105a(a) by adding the following subsection:

> "(6) Whenever a petitioner seeks review of [a final order of deportation] under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." Pub. L. No. 101-649, § 545(b)(3), 104 Stat. 4978, 5065 (1990).

This provision for consolidating review of the final deportation order with review of the Board's disposition of a motion to reopen or reconsider would make no sense at all unless separate petitions for review could be filed. If Congress had intended to provide for a single petition for review covering both the original deportation order and the subsequent denial of a motion for reconsideration, there would not be two review proceedings to consolidate.

Arguing against the conclusion that the Ninth Circuit approach should no longer be followed is *Fleary v. I.N.S.* (n. 4, *supra*), where the Eleventh Circuit decided -- based in part on the absence of any legislative history contrary to this conclusion -- that the 1990 legislation "follows the contours of the Ninth Circuit decisions." 950 F.2d at 713. Subsequent to *Fleary*, however, the Court of Appeals for the Seventh Circuit declared that the 1990 enactment of 8 U.S.C. § 1105a(a)(6) "has put to rest" the conflict that previously existed between cases such as *Nocon* in the Third Circuit and *Hyun Joon Chung* in the Ninth Circuit. See *Akrap v. I.N.S.*, 966 F.2d 267, 271 (7th Cir. 1992). The logic of the Seventh Circuit's *Akrap* decision strikes us as irrefutable:

> "By its own terms [§ 1105a(a)(6)] refers to the consolidation of two reviews (and not to the 'consolidation' of BIA 'orders' as *Fleary*, 950

> F.2d at 713 suggests). If the filing of a motion to reopen were to render any previous orders non-final, only one final order would exist -- and what then would be subject to 'consolidation' even in the *Fleary* view?
>
> In short, any such rule as *Fleary* prescribes would also be incompatible with the plain language of [§ 1105a(a)(6)]. We hold that BIA's . . . deportation order was a final order when issued, and it remained a final order notwithstanding Akrap's motion to reopen." *Id.*

Applying the logic of *Nocon* and *Akrap* here, we conclude that the deportation order of July 26, 1991, was a final order when issued. The order remained a final order notwithstanding Mr. Stone's subsequent filing of a motion for reconsideration -- and the petition for judicial review filed in 1993 came too late to give us jurisdiction with respect to the 1991 deportation order.

In reaching this conclusion we are mindful of the Supreme Court's admonition in *Cheng Fan Kwok v. I.N.S.*, 392 U.S. 206, 212 (1968):

> "Section 106(a) [8 U.S.C. § 1105a(a)] is intended exclusively to prescribe and regulate a portion of the jurisdiction of the federal courts. As a jurisdictional statute, it must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes."

III

Contending that government employees gave him erroneous advice on the procedure to be followed in obtaining review of the deportation order, Mr. Stone suggests that we should find the I.N.S. estopped to raise the jurisdictional issue. The suggestion is not well taken.

In general, equitable estoppel may be invoked against the government in deportation proceedings only where the government has been guilty of "affirmative misconduct." *Bolourchian v. I.N.S.*, 751 F.2d 979, 980 (9th Cir. 1984). No affirmative misconduct is alleged in the instant case; the most that can be said is that Mr. Stone (who was trained as a lawyer himself) may have been given imperfect legal advice on an area of the law that can fairly be said to have been unsettled.

Even if the government were precluded from raising the jurisdictional issue, moreover, we would have an obligation to do so ourselves -- and except as specifically authorized by law, we are prohibited by Rule 26(b), Fed. R. App. P., from enlarging the time prescribed by law for filing a petition for review. Nothing in the law authorizes us to enlarge the 90-day period established in 8 U.S.C. § 1105a(a)(1).

IV

Although the 1990 amendment is inconsistent with the conclusion previously reached by the Ninth Circuit in *Bregman* and its offspring, § 1105a(a)(6) does reflect a congressional understanding that petitions for review may be filed with respect to rulings on motions to reopen or reconsider. The narrow holding of *Giova v. Rosenberg*, 379 U.S. 18, thus survived the 1990 legislation, even though *Giova*'s broader implications did not; we clearly have jurisdiction, as the I.N.S. acknowledges, to review the order in which the Board denied Mr. Stone's motion to reconsider. (The petition for review was filed, as the reader may remember, within 90 days after the date on which the motion was denied. Not counting the time during which the motion for reconsideration was pending, moreover, the time that elapsed between the issuance of the 1991 deportation order and the 1993 denial of the motion for reconsideration did not exceed 90 days.)

Our standard of review is one of abuse of discretion -- see *Dawood-Haio v. I.N.S.*, 800 F.2d 90, 95 (6th Cir.

1986) -- and we are satisfied that the Board did not abuse its discretion in denying Mr. Stone's motion for reconsideration. The caselaw cited in the motion did not support the conclusion that Mr. Stone should be permitted to remain in the United States, and we fully agree with the Board's characterization of the motion as "frivolous."

Insofar as the petition for review applies to the final order of deportation, the petition is **DISMISSED FOR WANT OF JURISDICTION**; insofar as it applies to the denial of the motion for reconsideration, the petition is **DENIED**.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church Virginia
22401

Decision of the
Board of Immigration
Appeals

File A 21 029 325 - Cincinnati

In re: MARVIN STONE Jul 26 1991

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: William A Cassidy
General Attorney

CHARGE:

Order: Sec 241(a)(2), I & N Act
[8 U.S.C. § 1251(a)(2)]
Nonimmigrant -remained longer
than permitted

APPLICATION: Suspension of Deportation

The decision of the immigration judge dated January 29, 1988, which found the respondent deportable as charged and denied his applications for suspension of deportation pursuant to section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)m, and for voluntary departure pursuant to section 244(e) of the Act, is affirmed. The respondent's appeal is dismissed.

The respondent is a 58-year-old native and citizen of Canada who entered the United States in 1978 as a nonimmigrant visitor. [1]He was convicted in 1982 in the Eastern District of

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[1]The Service asserted in the Order to Show Cause that the respondent entered the United States as a nonimmigrant visitor for pleasure. The respondent asserted as his deportation hearing, however, that he entered the United States in 1977 as a nonimmigrant visitor for business.

Kentucky of conspiracy to commit mail fraud and mail fraud pursuant to 18 U.S.C. § 371 and 1341. He was sentenced to 3 years in prison on one count and 5 years suspended plus 5 years probation on counts 2, 3 and 4. He was actually incarcerated for approximately 18 months. On November 27, 1984, the United States Court of Appeals for the Sixth Circuit affirmed the respondent's conviction. An Order to Show Cause was issued on March 18, 1987, charging the respondent with deportability pursuant to section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2), as a nonimmigrant who remained longer than permitted. At his deportation hearing on August 24, 1987, the respondent admitted that he is a native and citizen of Canada but denied that he was a nonimmigrant who remained longer than permitted and denied his

deportability. The immigration judge found him deportable based on his admission that he was an alien who entered the United States temporarily for business in 1977, and based on his testimony that he has not become a lawful permanent resident of the Untied States since that time, nor has he requested an extension of time to remain in the United States. The respondent then applied for and was denied suspension of deportation pursuant to section 244(a) of the Act. The immigration judge denied him that relief based on his finding that the respondent was precluded from establishing good moral character by section 101(f) of the Act, 8 U.S.C. § 1101(f).

On appeal, the respondent contends that the immigration judge erred in

denying him a continuance pending an appeal to the Supreme Court in a case similar to his; that he was incorrectly found to be not of good moral character because he lacked a fraudulent intent; that the Service regulations relating to the time limits allowed nonimmigrant visitors to the United States are unconstitutional as violative of due process because the statutes themselves mention no time limits; and that the Service did not establish deportability because it produced no proof that he entered the United States as a visitor.

We first consider the respondent's assertion that the Service did not establish deportability. In order to establish an alien's deportability as an overstay, the Service need only show that the alien was admitted as a nonimmigrant

for a temporary period; that the period has elapsed; and that the alien has not departed. See Equan v. United States INS, 844 F.2d 276,278 (5th Cir. 1988); Kahlenberge v. INS, 763 F.2d 1346, 1352 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); Che-Lei Shen v. INS, 749 F.2d 1469,1472 (10th Cir. 1984); Ho Chong Tsao v. INS, 538 F.2d 667, 678 (5th Cir. 1976), cert. denied, 430 U.S. 906 (1977); Milande v. INS, 484 F.2d 774, 776 (7th Cir. 1973); Matter of Santos, 19 I&N Dec. 105 (BIA 1984); Matter of Teberen, 15 I&N Dec. 689 (BIA 1976). Once alienage has been admitted, however, the burden shifts to the alien to show place, time, and manner of entry, and his right to remain in the United States. Matter of Benitez, 19 I&N Dec. 173 (BIA 1984). If an alien refuses to provide information about the time, place, and manner of entry, he is

presumed to be in the United States unlawfully. Id. at 177.

At the time of the respondent's entry into this country, Service regulations provided that visitors for business could "be admitted for an initial period of not more than six months" and could be granted extensions of temporary stay "in increments of not more than six months." Visitors for pleasure could "ordinarily" be admitted for "not more than six months," but could be admitted "for a longer period not exceeding one year if the admitting immigration officer determines that emergent, compelling, or other special circumstances exist warranting such longer admission period." 8 C.F.R. § 214.2(b) (1977), (1978). The regulations did not provide in either 1977 or 1978,

that a visitor could be admitted, for business or pleasure, for an indeterminate amount of time.

In the present case, the respondent admitted alienage and admitted entry into the United States as a nonimmigrant visitor for business in 1977. He admitted that he is not a lawful permanent resident and that he never obtained extensions of his nonimmigrant visa. Accordingly, based on the respondent's own admissions, it has clearly been established that the respondent entered as a nonimmigrant subject to a certain period of stay, that that time period has elapsed, and that the respondent has not departed. We find that these admissions are clear, unequivocal, and convincing and prove each of the elements of the charge of

deportability. See Woodby v. INS, 385 U.S. 276 (1966).

In regard to the respondent's contention that the Service regulations are unconstitutional, this Board does not have the authority to judge the constitutionality of statutes or regulations. See 8 C.F.R. § 3.1(b). We note, however, that Service regulations have the force and effect of law. Matter of A-, 3 I&N Dec. 714 (C.O. 1949; BIA 1949, A.A.G. 1949); Matter of C-, 1 I&N Dec. 631, 634 (BIA 1943; A.G. 1944). See United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923). Moreover, the immigration laws have been amended a number of times subsequent to the adoption of the regulations at issue here, without reference to the adoption of the long-standing Service practice of limiting the time an alien is permitted to remain in the United States without an extension. This failure to act adversely to a long-standing practice gives rise to an inference that Congress has approved the regulations regarding nonimmigrant visitor

visas. See Helvering v. Winmill, 305 U.S. 79, 83 (1938); Costanzo v. Tillinghast, 287 U.S. 341, 345 (1932).

We also reject the respondent's contention that the immigration judge erred in failing to grant him a continuance pending the outcome of someone else's appeal. The regulations provide that a continuance may be granted in the immigration judge's discretion if good cause is shown. 8 C.F.R. § 242.13 (1987). See Matter of Perez-Andrade, 19 I&N Dec. 433 (BIA 1987). A decision to deny a continuance will not be overturned on appeal unless it appears that the respondent was deprived of a full and fair hearings. Matter of Namio, 14 I&N Dec. 412 (BIA 1973). Further, a respondent is not entitled to relief as a result of a procedural error unless he can establish that he was prejudiced by the error. Matter of Santos, supra. In this case, the respondent has not demonstrated that he had good cause for a continuance or that he was prejudiced in any manner. As noted above, the respondent's own direct appeal had already been rejected by the Sixth Circuit in 1984. As the decision in his case was clearly final, no purpose could be served by granting a

continuance to await the outcome of any other appeals, and the immigration judge's decision to deny the continuance was clearly not in error.

We turn now to the merits of the respondent's application for suspension of deportation. Section 244(a) provides for the suspension of deportation, in the discretion of the Attorney General, of any alien who has been physically present in the United States for a continuous period of not less that 7 years immediately preceding the date of such application, who proves that during all of such period he was and is a person of good moral character, and who is a person whose deportation would result in extreme hardship to the alien or his United States citizen spouse, parent, or child.

Upon our review of the record, we affirm the immigration judge's conclusion that the respondent is statutorily precluded from a finding of good moral character based on the provisions of section 101(f)(7) of the Act, 8 U.S.C. § 1101 (f)(7). This section provides that no person

shall be regarded as, or found to be, a person of good moral character if that person was:

> (7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred eighty days or more, regardless of whether the offense, or offenses for which he has been confined were committed within or without such period.

As the respondent in this case was confined to a penal institution for 18 months, until the middle of 1987, he therefore is precluded by statute from establishing good moral character.

We further find that even if the respondent had been found to be of good moral character, he would still be statutorily ineligible for relief by virtue of the fact that he has failed to establish extreme hardship. The elements required to establish extreme hardships are dependent upon the facts and

circumstances peculiar to each case. See Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978); Matter of Kim, 15 I&N Dec. 88 (BIA 1974); Matter of Sangster, 11 I&N Dec. 309 (BIA 1965). See also Jara-Navarrete v. INS, 813 F.2d 1340 (9th Cir. 1986), amending, 800 F.2d 1530 (9th Cir. 1987); Zavala-Bonilla v. INS, 730 F.2d 562 (9th Cir. 1984); Ramos v. INS, 695 F.2d 181 (5th Cir. 1983). Factors relevant to the issue of hardship include the respondent's age; the length of his residence in the United States; his family ties in the United States and abroad; his health.; the economic and political conditions in the country to which he may be returned; his financial status, business, or occupation; the possibility of another means of adjustment of status; his immigration history; and his position in the community. See Hernandez-Patino v. INS, 831 F.2d 750 (7th Cir. 1987); Jara-Navarrette v. INS, supra; Matter of Gibson, 16 I&N Dec. 58 (BIA 1976); Matter of Uy, 11 I&N Dec. 159 (BIA 1965). Relevant factors must be considered in the aggregate in determining whether extreme hardship exists. See Hernandez-Patino v. INS, supra; Ramirez-Duranzo v. INS,

794 F.2d 491 (9th Cir. 1986); Ravancho v. INS, 658 F.2d 169 (3d Cir. 1981).

In this case, the respondent has offered no evidence of extreme hardship. He is divorced and his children reside in Toronto, Canada. He has no close family in the United States. The economic and political climate in Canada is not such that it would be difficult to readjust to life there; indeed, he lived his entire life in Canada and did not begin to reside in the United States for any significant period of time until he was well into his forties. Therefore, even if he had been found to be a person of good moral character, we would not find him to statutorily eligible for suspension of deportation by virtue of his failure to establish extreme hardship.

We further find that, even if the respondent had been found to be statutorily eligible for suspension of deportation, we would deny such relief in the exercise of discretion. The respondent has been convicted of mail fraud and conspiracy to commit mail fraud. Furthermore, a review of the record shows that the respondent is the subject of an outstanding

warrant for his arrest on charges of theft and fraud in Canada. Accordingly, we find that the respondent does not merit suspension of deportation in the exercise of discretion.

ORDER: The appeal is dismissed.

FOR THE BOARD

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the
Board of Immig-
gration Appeals

Falls Church Virginia 22041

File A21 029 325 - Cincinnati Date Feb 3 1993

In re: MARVIN STONE

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: G Michael Wick
General Attorney

CHARGE:

Order: Sec 241(a)(2), I&N Act [8 U.S.C § 1251(a)(2)]
Nonimmigrant - remained longer than permitted

APPLICATION: Motion to reconsider

The respondent has made a motion that the Board reconsider its earlier decision of July 26, 1991, in which it dismissed the respondent's appeal and found him statutorily ineligible for relief from deportation pursuant to section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a). The motion to reconsider will be denied.

Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent. See 8 C.F.R. § 3.8 (1992). The moving party must be requesting reconsideration of points previously raised by one of the parties and dealt with by the Board in its decision. Matter of DeJong, 16 I&N Dec. 739 (BIA 1979).

In this case, the respondent has presented no new precedent decisions which have any bearing on our prior decision in this case nor has be submitted any legal authorities which the Board may have inadvertently overlooked. Moreover, both of the respondent's assertions in his motion to reconsider were adequately addressed by the Board in its July 26, 1991, decision.

Accordingly, we will deny the motion as frivolous. See 8 C.F.R. 3.1(d)(1-9)(iv) (1992). We note, furthermore, that the mere filing of a motion to reconsider does not allow an alien to remain in the United States or stay the execution of an outstanding deportation order. Execution of such an order must proceed unless a stay of execution is specifically granted by the Board or the Service officer

having jurisdiction over the case. See 8 C.F.R. § 3.8 (1992.)

ORDER: The appeal is dismissed.

FOR THE BOARD